

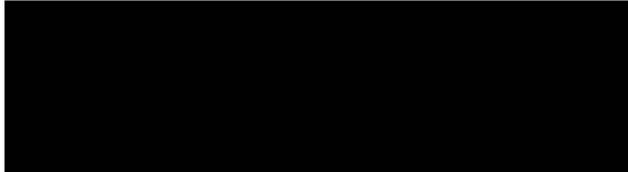


U.S. Citizenship
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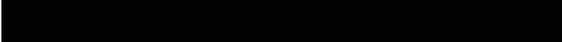
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FILE: EAC-03-258-56638 Office: VERMONT SERVICE CENTER Date: **MAY 19 2006**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a market place. It seeks to employ the beneficiary permanently in the United States as a wholesaler. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is February 5, 2001. The proffered wage as stated on the Form ETA 750 is \$54.90 per hour, which amounts to \$114,192.00 annually. On the Form ETA 750B, signed by the beneficiary on January 30, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on October 31, 2002.

The I-140 petition was submitted on September 15, 2003. On the petition, the petitioner claimed to have been established in February 1997, to currently have two employees and to have a gross annual income of \$2.6 million. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a decision dated September 30, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel states on appeal that the petitioner's bank statements show balances which exceed the monthly proffered wage. Counsel also states that the director

did not appear to have used generally accepted accounting practices in concluding that the petitioner's liabilities exceeded its assets.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 30, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000 and continuing through the date of the ETA 750B. However, the record contains no evidence corroborating the beneficiary's claim to have worked for the petitioner, and no evidence indicating the amount of any compensation paid by the petitioner to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also* *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001. That return covers the petitioner's tax year beginning February 1, 2001 and ending January 31, 2002. Since no request for additional evidence was issued by the director, the record before the director closed on September 15, 2003 with the receipt by the director of the I-140 petition. As of that date, the petitioner's federal tax return for its 2002 tax year should have been available, which presumably covered the period February 1, 2002 until January 31, 2003. However, a copy of the petitioner's federal tax return for its 2002 tax year was not submitted prior to the director's decision, nor has a copy of that return been submitted on appeal.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax return for 2001 states an amount for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$14,354.00	\$114,192.00*	\$(99,838.00)
2002	not submitted	\$114,192.00*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to the petitioner's tax return for 2001 yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$(14,638.00)	\$114,192.00*	\$(128,830.00)
2002	not submitted	\$114,192.00*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

The record also contains copies of bank statements for an account of the petitioner. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

2001:	Ending balances		Ending balances
January	-	July	\$13,888.41
February	\$818.35	August	\$17,843.99
March	\$1,576.99	September	\$8,265.55
April	\$4,043.51	October	\$3,732.62
May	\$2,639.16	November	\$21,386.57
June	\$15,724.00	December	\$21,184.26
2002:			
January	9,380.94		

In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Counsel cites the figure of \$10,351.00 as the petitioner's average balance for February through December 2001. The petitioner's bank statements contain figures for "Average Gross Bal" and for "Average Coll Bal." For some months, those figures are higher than the ending balances, and for other months, those figures are lower than the ending balances. Nonetheless, the differences between the average balances and the ending balances are not so great as to change the above analysis.

The record contains no other evidence relevant to the petitioner's financial situation. The evidence therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in 2001. The director stated that the petitioner's liabilities that year exceeded its assets by \$28,288.00. It appears that the director may not have limited her analysis to current assets and current liabilities. The correct figure for the excess of current liabilities over current assets is \$14,638.00. Nonetheless, the error did not affect the director's conclusion, since the both director's figure and the correct figure indicate negative net current assets. The director also found that the copies of bank statements in the record failed to establish the petitioner's ability to pay the proffered wage. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.